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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1653

W. L. WEARLY, *et al.*,

Petitioners,

—v.—

FEDERAL TRADE COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT

The petition was filed on April 18, 1980. Subsequently, on May 28, 1980, Congress enacted the Federal Trade Commission Improvement Act (Pub. L. 96-252, 94 Stat. 374, hereinafter referred to as the "1980 Amendments").

The 1980 Amendment to Section 10 of the Federal Trade Commission Act (hereinafter referred to as "FTC

Act"), 15 U.S.C. § 50[1] affirmatively supports the petition, and justifies this Court in remanding *per curiam*.

The 1980 Amendments Officially Confirm That Petitioner Wearly Was In Criminal Jeopardy In 1977

The Federal Trade Commission (FTC) insisted that the District Court did not have jurisdiction of what it described as a "preenforcement" action for a declaratory judgment, and it refused to present any evidence or argument on the merits. (Pet. App. 12a, fn. 8) The Court of Appeals accepted respondent's contention that the District Court did not have jurisdiction, and did not review the decision, opinions, judgment and protective order of the District Court on their merits.

The District Court held that Section 10 placed Wearly in the criminal jeopardy that satisfied the "horns of a dilemma" criteria in *Abbott Laboratories*[2] and that it was thereby authorized to take jurisdiction of the action for declaratory judgment in its discretion. (Pet. App. 135a-140a) The Court of Appeals disagreed, holding that "Wearly [was] under no compulsion to either turn over the documents to the FTC or suffer civil or criminal penalties as a result." (FTC. Br. 11)

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1 Amended Section 10 is printed at page 12 of respondents' brief (referred to hereinafter as "FTC Br. ____"), and also in petitioner's separate appendix to the petition, at pages 141a-142a, hereinafter referred to as "Pet. App. _____".

2 *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Toilet Goods Association, Inc.* v. *Gardner*, 387 U.S. 158 (1967); and *Gardner* v. *Toilet Goods Association, Inc.*, 387 U.S. 167 (1967).

The FTC brief in opposition states "any possibility that a party's good faith resistance to a subpoena prior to judicial enforcement might be challenged in a criminal prosecution under Section 10 of the FTC Act, 15 U.S.C. 50, *has been* eliminated by" the 1980 Amendment. (FTC Br. 12, emphasis supplied). The elimination of the offense from the statute in 1980 is *not retroactive,* and fortifies the contention of petitioners that the Court of Appeals ruling was erroneous. Even today, it would be legally possible to prosecute Wearly for his failure to respond to the subpoena in 1977, but for the District Court's intervention. The quotation from the Senate Report (Pet. 12) explained the need for the amendment to eliminate the very offense which Wearly endeavored to avoid committing by seeking the declaratory judgment. The report states specifically that the amendment was necessary to eliminate the very threat which the District Court found Wearly faced. (Pet. 12) The Conference Report which was the basis for acceptance of the final bill by both Houses stated:

"ENFORCEMENT AUTHORITY"

> *Senate Amendment.*—The Senate amendment would amend Section 10 of the FTC Act to provide that criminal penalties for failure to comply with FTC subpoenas apply only after a United States District Court orders compliance." (H. Rep. 96-917, 96th Cong. 2d Sess. p.29)

It is clear that Congress understood that refusal to comply with a FTC subpoena, even if respondent acted in "good faith", left him in jeopardy of criminal penalties of an "extreme nature" under Section 10 (Pet.

App. 143a). The 1980 Amendment eliminates that jeopardy, but only *in the future*.

As stated in the petition, the sole purpose of issuing the subpoena to Wearly individually, and not to the corporations which owned the documents, was to achieve the *in terrorem* effect of the threat of criminal action under Section 10.[3] Before enactment of this amendment, parties served with FTC subpoenas, such as petitioner Wearly, were forced to risk criminal penalties, even when the "good faith" of their challenges to agency subpoenas were such that reasonable men could disagree. *See, United States* v. *St. Regis Paper Co.*, 368 U.S. 208 (1961) (discussed in the petition at 10-11) upon which Wearly relied, but which the Court of Appeals did not mention in its opinion.

The Court of Appeals held that the case was not "ripe for preenforcement" under *Abbott Laboratories* because Wearly (in its view) could raise all of the objections raised below in an enforcement proceeding brought by the petitioner under Section 9 (15 U.S.C. § 49). However, the key point involved in Wearly's petition to this Court is not whether he could have raised those objections in an enforcement proceeding, but whether he was in criminal jeopardy under Section 10 even though his refusal to submit documents was "in good faith". The Third Circuit erroneously concluded that Section 10 did not create any risk of criminal jeopardy since Wearly "acted in good faith", but the view of Congress is directly to the contrary.[4]

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3 The threat of criminal jeopardy was not speculation by Wearly: the FTC specifically warned him of criminal penalties for failure to comply with the subpoena. (Pet. 4, 12)

4 Furthermore, in ruling that the District Court did not have jurisdiction on the ground that Wearly was not in criminal jeopardy,

The action of Congress in amending Section 10 to eliminate specifically the jeopardy of criminal liability for refusal to produce documents, even though the refusal was made in good faith, should be considered by this Court as authoritative and final. It is not simply the view or opinion of a single member of Congress, or a subcommittee, it is the expression of Congress itself expressed in the statute and the language of the Senate Report which was the predicate for the amendment.

The Confidentiality Provisions Of The 1980 Amendments Are Not Before This Court, And Should Not Be Considered

The FTC contends that since the 1980 Amendments' confidentiality provisions eliminate "substantially" petitioners' fears of competitive injury, "Further review by the Court is therefore unwarranted". (FTC Br. 6) The fallacy in the FTC's contention is that on the state of the record before this Court, none of the issues of confidentiality have been presented to this Court. The *only* issue presented by the petition for a writ of certiorari is whether the District Court had *jurisdiction* to entertain the action for a declaratory judgment. Petitioners could not properly present or discuss the merits of their case on their petition for a writ of certiorari, as the Court of Appeals did not consider or pass on them.

This Court does not have before it the complaint, or Part II of the District Court's judgment which

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the Court of Appeals ignored completely the position of petitioners Ingersoll-Rand and Torrington, although it acknowledged that the subpoena was issued only to Wearly. (Pet. App. 3a).

constitutes the protective order. (Pet. App. 92a) Therefore, this Court should not determine whether the confidentiality provisions of the 1980 Amendments deprive petitioners of the right to maintain this action for declaratory and injunctive relief instituted in 1977. (FTC Br. 9)

CONCLUSION

1. The 1980 Amendment to Section 10 of the FTC Act completely supports petitioners' claim that the District Court did have jurisdiction of this action.

2. This Court cannot consider on this petition what effect, if any, the 1980 Amendment provisions on confidentiality have on the District Court's judgment because (a) the Court of Appeals did not review the merits of the case, and (b) the District Court should consider this matter in the first instance.

3. The petition for a writ of certiorari should be granted and the Court of Appeals' decision should be summarily reversed *per curiam*, and remanded for further consideration.

Respectfully submitted,

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August 13, 1980